

**01-1124 S.W. v. EDG Fashion Floors Issued: 05/31/05**

S. W. asks the Utah Labor Commission to review Administrative Law Judge La Jeunesse's denial of Ms. W.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated). EDG Fashion Floors and its workers' compensation insurance carrier, Workers Compensation Fund (referred to jointly as "EDG"), ask the Commission to consider whether Ms. W. is entitled to additional medical benefits under the Act.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

**BACKGROUND AND ISSUES PRESENTED**

On October 28, 1995, Ms. W. slipped and injured her right knee while working for EDG. On October 25, 2001, she filed an application for hearing with the Commission to compel EDG to pay medical expenses and permanent total disability compensation for her knee injury and other allegedly related problems.

Pursuant to the parties' stipulation, Judge La Jeunesse appointed a medical panel to consider the medical aspects of Ms. W.'s claim. After receiving the panel's report, Judge La Jeunesse held an evidentiary hearing on March 10, 2004. On August 23, 2004, Judge La Jeunesse issued his decision concluding that Ms. W. was not permanently and totally disabled within the meaning of the Utah Workers' Compensation Act because she could perform other work reasonably available to her.

As noted above, both Ms. W. and EDG have filed motions for review of Judge La Jeunesse's decision. The sole issue raised by Ms. W.'s motion for review is whether she can perform other work reasonably available to her. EDG's motion for review seeks "to protect [its] rights to appeal any order for medical care and/or expenses . . . ."

**FINDINGS OF FACT**

The Commission adopts Judge La Jeunesse's findings of fact. As material to the issues now before the Commission, the facts may be summarized as follows.

Ms. W. was born on January 12, 1949. She has worked in banking, restaurant management, radio advertising sales, and flooring sales for EDG. She had also previously owned and operated two large "crafts" stores.

On October 28, 1995, the date of Ms. W.'s work accident, she was employed as a sales representative by EDG Fashion Floors. As Ms. W. was cleaning a floor, she slipped and twisted her knee. Over the next several years, Ms. W. underwent two arthroscopic surgeries on her right knee, as well as various other non-surgical treatments. She has now been diagnosed with Complex Regional Pain Syndrome ("CRPS"). Ms. W.'s knee problems and CRPS have left her with a 26% whole person impairment.

Taken together, Ms. W.'s knee and CRPS problems prevent her from walking or standing for

any length of time and prevent kneeling, squatting or climbing. She experiences chronic pain and hypersensitivity in her legs, as well as difficulty concentrating. She is, however, able to work at a sedentary level, which would include light occasional lifting and movement.

During the period after Ms. W.'s work accident, she obtained a B.S. degree in Management and Human Resources from Southern Utah University. Ms. W. was able to perform the college coursework in four years' time and graduate with honors in 2001.

Other than requesting reemployment by EDG, Ms. W. has not applied for any work or otherwise explored any employment possibilities. Through her attorney, she has rebuffed efforts by EDG's insurance carrier to provide reemployment assistance. Ms. W. has submitted the opinion of Mr. Lister, a vocational counselor, to the effect that no work is available to Ms. W.. However, Mr. Lister's opinion is based on his own judgment that Ms. W. cannot perform even sedentary work. This opinion is not supported by the preponderance of evidence which, as noted above, establishes that Ms. W. is able to work in sedentary occupations.

For its part, EDG has submitted evidence that numerous sedentary employment opportunities exist in the St. George area that are within Ms. W.'s skill level and physical ability.

### **DISCUSSION AND CONCLUSION OF LAW**

There is no dispute that, as a result of her accident at EDG on October 28, 1995, Ms. W. suffered injuries that are compensable under the workers' compensation system. The question before the Commission is whether Ms. W. has established her right to the specific workers' compensation benefit of permanent total disability compensation. In order to qualify for permanent total disability compensation, Ms. W. must satisfy each element of the test set out in § 413(1)(b) and (c) of the Act. Furthermore, § 413(b) specifically provides that the burden of proof is on Ms. W..

Judge La Jeunesse denied Ms. W.'s claim for permanent total disability compensation based on his determination that she had failed to satisfy § 413(1)(c)(iv)—the requirement that she “cannot perform other work reasonably available, taking into consideration [her] age, education, past work experience, medical capacity, and residual functional capacity.” The Commission therefore turns to consideration of that issue.

The Commission notes that § 413(1)(c)(iv) does not limit itself only to consideration of Ms. W.'s work-related limitations, but requires consideration of all her limitations, from whatever source. With this in mind, it is clear that Ms. W. suffers from some very real medical and functional problems. Her CRPS and knee problems have caused a 26% whole person impairment. These conditions limit her ability to walk or stand for more than short periods and prevent kneeling, squatting or climbing. She has pain and hypersensitivity in her legs. These problems understandably result in some difficulties in concentrating.

Despite the foregoing medical and functional limitations, Ms. W. remains able to perform some types of work, albeit at a sedentary level. Such employment is consistent with Ms. W.'s strengths and assets, including her substantial business and management experience and her college degree. Furthermore, the preponderance of evidence establishes that such employment is actually

available in the St. George area.<sup>1</sup>

On balance, the Commission concludes that Ms. W. has failed to discharge her burden under §413(1)(c)(iv) of establishing that she “cannot perform other work reasonably available . . . .” For that reason, her application for permanent total disability compensation must be denied.

Turning now to EDG’s motion for review, the Commission notes that EDG requests review of Ms. W. ‘s entitlement to medical benefits. However, EDG has not been ordered to pay any such benefits. Under such circumstances, there is nothing for the Commission to review and the Commission will, therefore, dismiss EDG’s motion for review.

### **ORDER**

The Commission affirms and adopts Judge La Jeunesse’s decision and denies Ms. W.’s motion for review. The Commission dismisses EDG’s motion for review. It is so ordered.

Dated this 31<sup>st</sup> day of May, 2005.

R. Lee Ellertson, Commissioner

1. In her motion for review, Ms. W. submits new evidence regarding the unsuitability of the employment opportunities identified by EDG. However, Ms. W. made no effort to submit such evidence during the evidentiary hearing and it would be inappropriate for the Commission to consider such evidence now. Furthermore, even if the Commission were to disregard the specific employment opportunities in question, the preponderance of evidence would still establish that other suitable work is available for Ms. W.